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JUN 7 1984
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No. 83-1812

IN THE

Supreme Court of the United States

October Term, 1983

JAMES D. BACHTEL AND DONNA BACHTEL,
Petitioners,

v.

MAMMOTH BULK CARRIERS, LTD.,
Respondent,

v.

TWIN HARBOR STEVEDORING COMPANY,
Intervenor.

BRIEF OF RESPONDENT MAMMOTH BULK CARRIERS, LTD. IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED

Did the Ninth Circuit Court of Appeals properly apply the principles of *Scindia Steam Navigation Co. v. De Los Santos*, 451 U.S. 156 (1981), in ruling that the shipowner had no duty to rig safety lines and no duty to insist that the stevedore do so?

TABLE OF CONTENTS

Page

Statement of the Case 2

Summary of Argument 4

Reasons For Denying the Writ 5

I. There Is No Conflict Between the Ninth and Fourth Circuit Courts of Appeals on the Shipowner's Duty to Intervene 5

II. The Ninth Circuit Court of Appeals Followed This Court's Order to Consider the Case in Light of *Scindia*, and Properly Applied the *Scindia* Principles . 10

A. The Ninth Circuit Court of Appeals Followed this Court's Mandate on Remand 10

B. The Ninth Circuit Court of Appeals Applied the *Scindia* Principles 11

C. *Scindia* Does Not Require Every Longshoreman Injury Case to Go to the Jury 12

D. The Ninth Circuit Court of Appeals Correctly Decided the Issue of the Crew's Alleged Involvement in the Lashing Operation 13

III. There is No Important Need for This Case to be Reviewed by the Supreme Court 15

Conclusion 15

TABLE OF AUTHORITIES

Table of Cases

Bandeen v. United Carriers (Panama) Inc., 712 F.2d 1336 (9th Cir. 1983) 4,6,7,8-9

Bonds v. Mortensen and Lange, 717 F.2d 123 (4th Cir. 1983) 9,14

Bueno v. United States, 687 F.2d 318 (9th Cir. 1982) . . 6

Davis v. Partenreederei M.S. Normannia, 657 F.2d 1048 (9th Cir. 1981) 6

Gill v. Hango Ship-Owners/AB, 682 F.2d 1070 (4th Cir. 1982) 6

Hill v. Texaco, Inc., 674 F.2d 447 (5th Cir. 1982) 7

Mammoth Bulk Carriers, Ltd. v. Bachtel, 451 U.S. 978 (1981) 4,10

Scindia Steam Navigation Co. v. De Los Santos, 451 U.S. 156 (1981) 4,5,6,7,8,*passim*

Woodruff v. United States, 710 F.2d 128 (4th Cir. 1983) 8,9

Statutes

33 U.S.C. § 941 7

Rules and Regulations

Fed. R. Civ. P. 50 12

9th Cir. Rule 21(c) 15

Other Authority

Restatement (Second) of Torts § 414, comment c (1965) 14

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Respondent Mammoth Bulk Carriers, Ltd.[1] respectfully requests that the petition for writ of certiorari be denied.

1. At the time of the incident at issue, Respondent Mammoth Bulk Carriers, Ltd. was owned by Trans Union Ocean Shipping Group, Inc. In December, 1981 Trans Union was purchased by Rosemont Shipping, Ltd., a privately held company.

STATEMENT OF THE CASE

Petitioner James Bachtel was injured on June 29, 1974, when he fell overboard from Respondent's ship, the MAMMOTH FIR, while in the course of his employment as a longshoreman. His stevedore/employer, Twin Harbor Stevedoring Co., was engaged in loading and lashing logs on the MAMMOTH FIR in the Port of Aberdeen, Washington. Loading had begun four days before. All of the logs had been loaded by the longshoremen at the direction of the stevedore. Reporter's Transcript at 120 (hereinafter cited as "RT"). After the logs were loaded underdeck, the hatches were closed and the logs were loaded on the deck. When the on-deck load was topped off and crowned, the longshoremen began to "lash" the load to the deck. The object of lashing was to secure the deckload of logs to the ship. This involved hooking lashing chains and wires on the ship's cranes, and pulling the lashing chains across (athwartships) the top of the load with the ship's cranes. RT at 51-52. The ship's cranes were operated by winch drivers, RT at 50, 56, who were also employed by the stevedore. RT at 128. When the chains were finally pulled across the deckload, the longshoremen tightened them down with turnbuckles, creating a secure stow. RT at 53.

At trial, Mr. Bachtel had no recollection of any of the details of his fall. The trial court had to rely on others who observed various aspects of his fall. According to his longshoreman-partner, Mr. Bachtel and his fellow longshoremen were engaged in the lashing procedure at the time of his fall. After a lashing chain had been pulled across the top of the load, Mr. Bachtel and his partner were taking the twists out of the chain so it would lie flat. Mr. Bachtel was near the edge of the deckload, and his partner was five or ten feet inboard. RT at 54. Mr. Bachtel was working on his hands and knees. RT at 56. The next thing his partner knew, Mr. Bachtel had disappeared over the side. RT at 56. The only thing his partner saw was Mr. Bachtel's feet going over, and he did not actually see him fall. RT at 130.

Mr. Bachtel's fall was witnessed by a woman sitting in a car on the dock. She could see Mr. Bachtel very clearly. RT

at 338-40. He was walking on the logs, and "[a]ll of a sudden he just fell." RT at 340.

Regardless of whether Mr. Bachtel was on his hands and knees, or walking, when he fell, it is undisputed that the Respondent/shipowner had no part in causing him to fall. There was no malfunctioning of ship's equipment. Rather, Petitioners' sole theory is that the shipowner should have rigged lines or nets as a barrier around the perimeter of the ship, or insisted that the stevedore do so.

The lashing operation was being conducted by the stevedore. The lashing operation in the Port of Aberdeen has traditionally been performed exclusively by the stevedore, although the ship's crew often will make a final check to make sure the lashings are tight so the logs will not shift at sea. Clerk's Record 113 at 34 (hereinafter cited as "CR"). Mr. Bachtel fell from atop the deckload of logs, a working surface and working environment that the stevedore had created through loading. RT at 120-21, 152.

On the day of Mr. Bachtel's fall, the lashing was proceeding in the same manner it had on every log ship in the Port of Aberdeen, both before and after the MAMMOTH FIR's call. The witnesses with a background in longshoring called at trial had a sum total of 59 years of work loading log ships in the Pacific Northwest. RT at 46, 240; CR 113 at 33. *Not one* of the witnesses had ever seen, either before or after Mr. Bachtel's injury, a line or net rigged around the perimeter of a log ship. RT at 69-70, 251-52; CR 113 at 33. Two expert witnesses were called at trial. Neither testified that rigging lines or nets would be a feasible or safe alternative. Neither testified that rigging lines or nets would minimize the risk of people falling overboard. One of the experts had once observed safety belts used by longshoremen on a deckload of logs. These safety belts had been requested by the longshoremen and provided by the stevedore. RT at 253, 260.

On this record, the Ninth Circuit Court of Appeals determined that the shipowner was entitled to a directed verdict or judgment notwithstanding the verdict. The case was deemed to be controlled by the Ninth Circuit Court of Ap-

peals' previous opinion in *Bandeen v. United Carriers (Panama) Inc.*, 712 F.2d 1336 (9th Cir. 1983). The court indicated that it had searched the record in this case for any inferences that would permit a jury to find negligence on the part of the shipowner, and could find none. Memorandum Opinion of Ninth Circuit Court of Appeals, October 24, 1983 (text set forth in Brief of Petitioners, Appendix B at B-3 through B-7) (hereinafter cited as "Memorandum Opinion Below").

SUMMARY OF ARGUMENT

This Court previously remanded this case to the Ninth Circuit Court of Appeals for further consideration in light of *Scindia Steam Navigation Co. v. De Los Santos*, 451 U.S. 156 (1981). *See Mammoth Bulk Carriers, Ltd. v. Bachtel*, 451 U.S. 978 (1981). On remand, the Court of Appeals held that the district court's instructions did not conform with the requirements of *Scindia*, set aside the first judgment, and ordered further proceedings in accordance with *Scindia*. Unquestionably, that disposition complied with this Court's mandate on remand.

On the record from the second trial, the Ninth Circuit Court of Appeals held that the trial court should have directed a verdict or entered judgment n.o.v. for the Respondent shipowner. The Court of Appeals reasoned that the stevedore, not the shipowner, had the duty to rig safety lines if they were needed, and that the shipowner had no duty to intervene in the stevedore's decision not to do so. Because the trial record contained no evidence of defective ship's gear or of an obviously improvident decision by the stevedore to proceed with the work despite any such defect—decisive factors in *Scindia*—the Ninth Circuit's holding conforms entirely with *Scindia* and is therefore correct as a matter of law.

The alleged conflict between the Ninth and the Fourth Circuits is nonexistent. In the only Fourth Circuit case cited by Petitioners to delineate such a conflict, the shipowner's equipment and acts had caused the longshoreman's injury. That factually distinctive basis for shipowner liability is

legally consistent with *Scindia* and with the disposition below.

The Ninth Circuit Court of Appeals followed this Court's instructions on remand and applied *Scindia* properly. The petition for writ of certiorari presents neither an important, unsettled legal question nor a conflict between federal Courts of Appeals. Accordingly, the petition should be denied.

REASONS FOR DENYING THE WRIT

I. There Is No Conflict Between the Ninth and Fourth Circuit Courts of Appeals on the Shipowner's Duty to Intervene.

In *Scindia Steam Navigation Co. v. De Los Santos*, 451 U.S. 156 (1981), this Court stated that it was "quite possible" that the stevedore's judgment in continuing to work with a defective winch was "so obviously improvident" that the shipowner—if it knew that the ship's gear was defective and that the stevedore was continuing to use the winch—should have realized the unreasonable risk and intervened to repair the winch. *Id.* at 175-76. In deciding whether the duty to intervene had been triggered, it was relevant to consider the stevedore's duties, the shipowner's justifiable expectations that the stevedore would perform its duties safely, and any duties to repair defective ship's gear placed on the shipowner by statute, regulation or custom. *Id.* at 176. This Court recognized that the question of whether a shipowner's duty to intervene had been triggered was a decision to be made by the lower courts by applying the *Scindia* principles to the facts of each particular case. *Id.* at 178. This Court did not tell the Ninth Circuit Court of Appeals how it should decide the issue of the shipowner's duty to intervene in *Scindia*; it merely gave guidelines for the lower courts to apply ("We raise these questions but do not answer them, since they are for the trial court in the first instance. . . ." *Id.*).

As a ground for requesting certiorari in this case, Petitioners argue that the Ninth and Fourth Circuit Courts of Appeals are in conflict on the issue of the shipowner's duty to intervene. A close examination of the purportedly conflic-

ting cases will show, on the contrary, that the *Scindia* principles were and continue to be applied by both Circuits. Any differences in the outcome of the cases are the product of different factual evidence.

The Ninth Circuit Court of Appeals' decision in the case at bar was heavily influenced by its earlier opinion in *Bandeen v. United Carriers (Panama), Inc.*, 712 F.2d 1336 (9th Cir. 1983). In *Bandeen*, a longshoreman fell overboard from a deckload of logs. He predicated his claim of shipowner negligence on a failure to provide safety wires or netting between the ship's stanchions. The court affirmed the trial judge's directed verdict for the shipowner. The court began its analysis by applying the *Scindia* principles relating to the shipowner's duty to intervene. *Id.* at 1339 (citing *Scindia* at 451 U.S. 175-76). The *Bandeen* court concluded that applicable federal regulations imposed a duty on the *stevedore*, not the shipowner, to provide the safety wires and netting, if needed. 712 F.2d at 1339. Giving the longshoreman the strongest inferences from the evidence, the Court concluded:

> In light of the legislative history of the 1972 amendments, we are satisfied that the ship had neither the duty to rig the lines, nor the duty to intervene in the stevedore's decision not to do so.

Id. at 1340.

The *Bandeen* court distinguished *Davis v. Partenreederei M.S. Normannia*, 657 F.2d 1048 (9th Cir, 1981), *Gill v. Hango Ship-Owners/AB*, 682 F.2d 1070 (4th Cir. 1982), and *Bueno v. United States*, 687 F.2d 318 (9th Cir. 1982), on the ground that, unlike those cases, the shipowner's equipment and acts had not caused the plaintiff's injury. 712 F.2d at 1340.

In the case at bar, Mr. Bachtel fell from a deckload of logs. He predicated his claim of shipowner negligence on the same ground as Mr. Bandeen—failure to provide safety lines and netting. A different panel of the Ninth Circuit Court of Appeals from that in *Bandeen* examined the record and concluded that the "record in the instant case does not support any inferences more favorable to Bachtel than those reached in *Bandeen*." Memorandum Opinion Below (Brief of Petitioners, Appendix B at B-6).

In both *Bandeen* and *Bachtel*, the Ninth Circuit Court of Appeals stated: "If nets or lines were needed, it was the duty of the stevedore to provide them." *Bandeen*, 712 F.2d at 1339; *Bachtel*, Memorandum Opinion Below (Brief of Petitioners, Appendix B at B-5). The stevedore, not the shipowner, was in the best position to supply its employees with safety equipment, if needed.

This finding is consistent with the guiding principles of *Scindia*. There, this Court emphasized the stevedore's statutory duty (33 U.S.C. § 941) to provide its longshoremen-employees with a safe place to work and safe equipment. *Scindia*, 451 U.S. at 170. In discussing the shipowner's justifiable expectations regarding the stevedore's expertise, this Court stated:

> The shipowner defers to the qualification of the stevedoring contractor in the *selection and use of equipment* and relies on the competency of the stevedore company.

Id. at 171-72 (emphasis added). In his concurring opinion in *Scindia*, Justice Powell stated: "I join the Court's opinion because I agree with its basic thrust—placing the primary burden on the stevedore for avoiding injuries caused by obvious hazards." *Id.* at 180 (J. Powell concurring). *See also Hill v. Texaco, Inc.*, 674 F.2d 447 (5th Cir. 1982) (duty to require longshoreman to wear safety belt was stevedore's, not shipowner's).

In neither *Bandeen* nor *Bachtel* did the Ninth Circuit Court of Appeals find a duty on the shipowner to intervene and insist that the stevedore rig lines. Neither case involved malfunctioning ship's gear, as in *Scindia*. In the case at bar, the alleged negligence was a failure to supply safety equipment to be used at a certain stage of the cargo operations—during lashing. Yet, no witness at trial had ever observed lines or nets rigged, and no witness testified that rigging lines or nets would be a feasible or safe alternative. How can it be "obviously improvident" to work under conditions that are normal and customary, that no one has ever seen performed differently and where there is nothing in the record to support the conclusion that there were safer and more

feasible alternatives? If "obviously improvident" means anything, it means that something is being done that usually is not (i.e., malfunctioning gear), or something is not being done that usually is done, and the departure from the norm is *obvious* and continued work in the face of it is *improvident*. Here, the stevedore was complying with the norm, the custom and standard in the industry. The Ninth Circuit Court of Appeals correctly found that these circumstances did not trigger the shipowner's duty to intervene.

Petitioners argue that *Bandeen* and *Bachtel* are in conflict with *Woodruff v. United States*, 710 F.2d 128 (4th Cir. 1983). In *Woodruff*, a longshoreman fell overboard from a United States Navy aircraft carrier. His fall occurred where there was a gap in the safety netting around the perimeter of the vessel. The evidence showed that the Navy had designed and installed safety wiring around the entire ship, including the particular area where the longshoreman fell, but the wiring in that particular area was not in place on the day of the injury. The trial court found that the wiring was under the Navy's (shipowner's) control, not the stevedore's.

The *Woodruff* court applied the same *Scindia* principles as applied in *Bandeen* and *Bachtel* with regard to the shipowner's duty to intervene. *Id.* at 130. In applying those principles to the facts, the Fourth Circuit Court of Appeals concluded that the shipowner had negligently omitted to put in place *shipowner equipment*, which the *shipowner had designed and undertaken to install*, and which was *under the shipowner's control*. *Id.* at 130-31.

This is the determinative factual difference between *Bandeen* and *Bachtel*, on the one hand, and *Woodruff* on the other. While in *Bandeen* and *Bachtel*, the Ninth Circuit Court of Appeals concluded that applicable regulations and custom placed a duty on the stevedore to provide safety wires and netting if deemed necessary, in *Woodruff* the Fourth Circuit Court of Appeals concluded that the shipowner had *assumed* the duty to provide safety wires because it had designed and installed wires, had control of the wires, and had removed them on the day of the injury. As the *Bandeen* court stated in distinguishing its ruling from other cases: "In this case,

the shipowner's equipment and acts did not cause the injury." 712 F.2d at 1340.

Further, a decision by the Fourth Circuit Court of Appeals after *Woodruff* indicates that the Fourth Circuit itself considers *Woodruff* to be a case determined by its unique facts. In *Bonds v. Mortensen and Lange*, 717 F.2d 123 (4th Cir. 1983), decided three months after *Woodruff*, the Fourth Circuit Court of Appeals reversed a judgment in favor of the longshoreman, ruling as a matter of law that the shipowner had no duty to intervene. In *Bonds*, a longshoreman was pinned between the leg of a moving gantry crane (ship's equipment) and a hatch pedestal. The trial court found that the injury was caused by a malfunctioning warning bell (ship's equipment) on the crane, and the ship's design. 717 F.2d at 124-25. The bell had been malfunctioning from the commencement of stevedoring operations. The Fourth Circuit Court of Appeals stated:

> [T]he malfunctioning bell and ship's design being obvious and known to all, the shipowner was entitled to rely on [the stevedore's] judgment as to whether discharge operations could be safely undertaken. [The stevedore] obviously concluded that these conditions did not pose an unreasonable risk of harm. . . .

Id. at 127-28 (footnote omitted). The Fourth Circuit Court of Appeals distinguished *Woodruff* on its facts. *Id.* at 128 n.5. Thus, even in a case of malfunctioning ship's equipment, the Fourth Circuit Court of Appeals has not imposed a duty upon the shipowner to intervene. This is further evidence that the lower courts are deciding each particular case on its own facts and merits, in light of the *Scindia* principles.

In summary, there is no direct or irreconcilable conflict between the Ninth and Fourth Circuit Courts of Appeals. Both Circuits have applied the relevant principles of *Scindia* in deciding whether the shipowner's duty to intervene has been triggered; both have considered the stevedore's duties under law; both have considered the shipowner's justifiable expectations that the stevedore will perform its duties; and both have considered the duties placed upon the shipowner by statute, regulation or custom. These considera-

tions are what *Scindia* requires. The difference in the outcomes of particular cases is simply the result of different factual situations.

II. The Ninth Circuit Court of Appeals Followed This Court's Order to Consider the Case in Light of *Scindia*, and Properly Applied the *Scindia* Principles.

A. The Ninth Circuit Court of Appeals Followed this Court's Mandate on Remand.

When this case was first before the Court in 1981 on petition for writ of certiorari following the first trial, this Court vacated the judgment of the Ninth Circuit Court of Appeals and remanded the cause "for further consideration in light of Scindia Steam Navigation Co. v. De Los Santos. . . ." *Mammoth Bulk Carriers Ltd. v. Bachtel*, 451 U.S. 978 (1981). On remand, the Ninth Circuit Court of Appeals considered the case in light of *Scindia*, and stated:

> [I]t being our considered conclusion that the instructions in the district court do not conform with the requirements of *Scindia . . . a new trial is necessary.*
>
> Accordingly, it is ORDERED that the judgment of the district court be set aside and that this case be remanded to the district court for further proceedings consistent with the opinion of the Supreme Court in *Scindia*. . . .

Order of Ninth Circuit Court of Appeals, filed June 29, 1981 (text set forth as Appendix A to Brief of Petitioners) (emphasis added).

As a ground for requesting certiorari, Petitioners contend that the Ninth Circuit Court of Appeals "failed to follow this Court's order to further consider this case in light of *Scindia*." Brief of Petitioners at 4. Petitioners' contention is clearly wrong. The Ninth Circuit Court of Appeals specifically stated in its remand order that it was a "considered conclusion" that the jury instructions at the first trial did not conform with *Scindia*. The Ninth Circuit Court of Appeals considered *Scindia*'s principles, applied them to the jury instructions given at the first trial, and found those instructions wanting. Setting aside the judgment and remanding for a new trial was the only way to correct this error. The Ninth Circuit did *exactly* what this Court directed it to do.

Once the Ninth Circuit Court of Appeals set aside the judgment from the first trial and remanded for a second trial, the trial record from the first trial was a nullity. The slate was wiped clean, and the parties had to make an entire new record at the second trial. The record made at the second trial was not "essentially identical" to the first trial, as Petitioners argue, but in truth was vastly different. This is the reason the Ninth Circuit Court of Appeals, when the case was before it on appeal following the second trial, found that Respondent should have been granted a directed verdict or judgment notwithstanding the verdict. It is the record from the second trial, not the first, that was before the Court of Appeals and is the subject of this petition for writ of certiorari. Each appeal can only be judged by the record upon which it is founded.

What Petitioners propose is that the Ninth Circuit Court of Appeals somehow contradicted itself in its evaluation of the record from the first trial and second trial. It should be remembered, however, that the Ninth Circuit Court of Appeals on remand held that the law applied at the first trial was inconsistent with *Scindia*. On the second appeal, the record was considered in light of *Scindia*. Rather than contradicting itself, the Ninth Circuit Court of Appeals corrected itself. It considered the case in light of *Scindia*, as this Court had directed. There is no substance to Petitioners' contention that the Ninth Circuit Court of Appeals did not follow this Court's mandate.

B. The Ninth Circuit Court of Appeals Applied the Scindia Principles.

As part of their argument that the Ninth Circuit Court of Appeals failed to consider this case in light of *Scindia*, the Petitioners contend that "the Ninth Circuit . . . ignored the Supreme Court's directive that a vessel owner may be held liable if the actions of the stevedore are so obviously improvident as to require the vessel owner to step in and correct the situation." Brief of Petitioners at 7. The language of the decision of the Ninth Circuit Court of Appeals indicates otherwise:

> *Bandeen* continues: "In light of the legislative history of the 1972 amendments, we are satisfied that the ship had neither the duty to rig the lines, nor the duty to intervene in the stevedore's decision not to do so." *Id.* at 3773-74.
>
> The record in the instant case does not support any inferences more favorable to Bachtel than those reached in *Bandeen*.

Memorandum Opinion Below, (Brief of Petitioners, Appendix B at B-6).

From the foregoing quoted language, it is beyond dispute that the Ninth Circuit Court of Appeals considered the shipowner's "duty to intervene" and searched the record in vain for inferences that would trigger that duty.

C. Scindia Does Not Require Every Longshoreman Injury Case to Go to the Jury.

The Ninth Circuit Court of Appeals ruled that the trial court should have directed a verdict or entered judgment notwithstanding the verdict for Respondent, the shipowner. In the Brief of Petitioners at 8-10, Petitioners advance the proposition that it is inappropriate for the trial judge or the reviewing appellate court to direct a verdict in a longshoreman injury case. Petitioners argue that "[n]othing in *Scindia* contemplates that each factual setting be evaluated by the bench, thereby removing it from the province of the jury." Brief of Petitioners at 9. Petitioners would apparently have this Court hold that Rule 50 of the Federal Rules of Civil Procedure is not applicable to longshoreman injury cases.

Respondent has discovered nothing in *Scindia*, or any other opinion of this Court, that would support such a proposition. This Court in *Scindia* made reference to a trial judge's necessary review of the evidence prior to submission to the jury. On the very same issue—the shipowner's duty to intervene—that Petitioners argue should always go to the jury, this Court stated in *Scindia*:

> If Scindia was aware that the winch was malfunctioning to some degree, and *if there was a jury issue* as to whether it was so unsafe that the stevedore should have ceased using it, could the jury also have found that the winch was so clearly unsafe that Scindia should have intervened and stopped the loading operation until the winch was serviceable?
>
> We raise these questions but do not answer them, since they are for the trial court in the first instance and since neither the trial nor appellate courts need deal with them *unless there is sufficient evidence to submit to the jury* either that the shipowner was aware of sufficient facts to conclude that the winch was not in proper order, or that the winch was defective when cargo operations began and that Scindia was chargeable with knowledge of its condition.

Scindia Steam Navigation Co. v. De Los Santos, 451 U.S. 156, 178 (1981).

This case, like all others, must be judged on its facts. If the evidence presented at trial can lead to only one reasonable conclusion, then a directed verdict is appropriate.

D. The Ninth Circuit Court of Appeals Correctly Decided the Issue of the Crew's Alleged Involvement in the Lashing Operation.

In the Brief of Petitioners at 10, Petitioners state that the Ninth Circuit Court of Appeals "failed to consider" the alleged participation of the crew in the lashing operation. This issue was fully briefed and presented to the Court of Appeals. See Appellants' Opening Brief at 33-36. What Petitioners are really saying is that they do not agree with the way the Ninth Circuit Court of Appeals decided the issue.

Petitioners' assertion that members of the ship's crew participated in the lashing operation is misleading and not supported by the record. Indeed, Petitioners have made *no* references to the trial record whatsoever. One longshoreman testified at trial that a single crew member was helping the longshoremen with the lashing. RT at 54-55. This crew member was "down below" on the ship's rail, which was even with the level of the dock where Mr. Bachtel landed *after* his fall. RT at 54-55. Thus, the crew member was some 30

feet below the area where Mr. Bachtel was working. RT at 59. The crew member working "down below" was doing work that the longshoremen considered undesirable, and they asked the crew member to do it. RT at 131-32. In contrast, there were three other longshoremen working in the immediate vicinity of Mr. Bachtel when he fell. RT at 141, 154.

The longshoreman-witness also testified that three other crew members were on deck at the time, RT at 55, but there was no testimony as to what these crew members were doing, and certainly no evidence that they were actively participating in the lashing being performed by the longshoremen.

The presence of crew members on deck observing the cargo operations of the stevedore does not constitute the "active involvement" of the shipowner. *Bonds v. Mortensen and Lange*, 717 F.2d 123, 127 n.4 (4th Cir. 1983). Even it it did, however, more is required under *Scindia*. Not only must the shipowner actively involve itself in the cargo operations, but it must also *negligently injure* the longshoreman as a result of its active involvement. *Scindia Steam Navigation Co. v. De Los Santos*, 451 U.S. 156, 167 (1981). There was no evidence at trial that the shipowner or its crew had anything to do with causing Mr. Bachtel's fall. In fact, the crew member "down below" saved Mr. Bachtel's life by jumping off the rail and preventing him from slipping between the ship and dock. RT at 131.

Petitioners also assert that the ship's crew had concurrent control over the cargo operations. Brief of Petitioners at 10. Again, this is unsupported by the record. The weight of the evidence at trial was that the lashing of logs was a *stevedore* function, and that the crew was customarily involved only to the extent of doing a final check to ensure that the lashings were tight. CR 113 at 34. There was no evidence that the shipowner was actively directing the details or controlling the methods of the stevedore's lashing work. *See Restatement (Second) of Torts* § 414, comment c (1965). If, for instance, Mr. Bachtel had been injured in the ship's engine room or galley, or other non-cargo area, then arguably the area would have been under the active control of the

shipowner. The fact is, however, Mr. Bachtel was injured in the course of his employment for the stevedore in the cargo area of the ship while engaged in cargo lashing.

III. There is No Important Need for This Case to be Reviewed by the Supreme Court.

This case is purely a dispute between individual litigants, with consequences to those individual litigants only. The Memorandum Opinion of the Ninth Circuit Court of Appeals is unpublished, and by its express terms, cannot be cited to or by the courts of the Ninth Circuit except as provided by Rule 21(c) of the Rules of the Ninth Circuit Court of Appeals. Memorandum Opinion Below (Brief of Petitioners, Appendix B at B-3).

The fact that this case was before this Court following the first trial should have no bearing on the merits of the petition for writ of certiorari following the second trial. This Court's mandate was followed, the case was re-tried, and a new and different record was before the Ninth Circuit Court of Appeals following re-trial.

Lastly, there is no need for this Court to again pass on the issue of the duties owed by a shipowner to a longshoreman. Those duties were comprehensively reviewed in *Scindia*. The *Scindia* principles were applied, and applied correctly, by the Ninth Circuit Court of Appeals.

CONCLUSION

For these reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted this
5th day of June, 1984,

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